Supreme Court

OF THE UNITED STATES.

In the Matter *of* The Petition of JOHN ANDERSON MASON for Writs of *Habeas Corpus* and *Certiorari*.	*October Term*, 1881. *No.* 16, *Original.*

Statement and Points for the Respondent, John McEwen, Superintendent of the Albany Penitentiary.

This is an order to show cause, dated the 3d April, 1882, why a writ of *habeas corpus* and *certiorari* should not issue under section 751 Revised Statutes, as prayed for by the petitioner, who claims that the General Court-Martial which tried him was illegal in its organization and procedure, and wholly without jurisdiction, and that the sentence under which he is serving is void.

It is to be noticed that, under Sec. 754, Revised Statutes, the application for the writ must set forth not only the facts concerning the detention of the party restrained, but also, *if known*, by virtue of what claim or authority he is held in custody.

The Exhibit No. 1, attached to the petitioner's application, *prima facie* shows that he was tried by a General Court-Martial for the crime set forth by reason of his being an enlisted soldier and non-commissioned officer in the army of the United States.

He nowhere alleges in his petition a fact clearly within his knowledge, whether he was a soldier or not, although he does, in his 2d allegation specifically declare that a certain other person was not enlisted in or a member of said army.

In the petitioner's 6th allegation, he inferentially admits that he was at the times specified a soldier in said army, in declaring that he was and has been declared discharged from the said army under the sentence to dishonorable discharge.

In the 7th allegation he distinctly admits that the General Court-Martial would, in time of war, have had jurisdiction of the crime charged against him (Petitioner's Exhibit, No. 1), which presupposes, as a condition precedent to the assumption of any such jurisdiction that he was in the military service.

In the same allegation, although later, admitting alternatively that possibly the General Court-Martial had jurisdiction, he contends that said Court was wholly without jurisdiction in the premises, both as to the charge alleged, as well as of his person.

The question as to whether the General Court Martial would have had jurisdiction of the person of the petitioner, would depend exclusively on the fact whether he was an enlisted soldier, voluntarily holding the appointment or warrant as First Sergeant under increased pay.

Such a fact, as before remarked, would be absolutely within the petitioner's knowledge, and is a material one concerning his detention, and if, in this proceeding or hearing, the petitioner desires to make any point as to his *personal* status, so far as the General Court-Martial which tried him is concerned, he should be required to set it forth as prescribed by the statute.

In other words if he claims that he was not a soldier, but a civilian, either on the 11th of September, 1881, or when tried by General Court-Martial, or that he made such a plea before that Court, it is

submitted that this Honorable Court and the respondent are entitled to be advised, and of the specific nature of such claim.

It is further submitted that the respondent is entitled to a specific declaration in respect to what particulars the General Court-Martial "was illegal in its organization as well as in its procedure" if the petitioner under this rule, relies on such averments, which are distinct from the question sufficiently presented in the petition, whether the General Court-Martial had jurisdiction over the offence of which he was tried and convicted.

In considering the rule of this Honorable Court to show cause why the prayer of the petitioner should not be granted, two questions arise:

1st. Has this Court jurisdiction?

2d. If it has jurisdiction, whether upon the facts stated, a fit case is made out to justify the exercise of such an authority?

POINTS FOR RESPONDENT:

First Point.—This Court has no jurisdiction to issue writs of *habeas corpus ad subjiciendum* and *certiorari*, as prayed for in the petition herein:

1. Because its original jurisdiction is restricted to cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party.

Const. Art. III *Sec.* 2.

2. Because, as stated by this Court in Barry *vs.* Mercein *et al* (5 How., 119) "by "the Constitution of the United States, it "possesses no appellate power in any case, "unless conferred upon it by act of Con- "gress; nor can it, when conferred, be ex- "ercised in any other form, or by any other "mode of proceeding than that which the "law prescribes."

In all cases where this power has been claimed or exercised by this Court, it has been invariably justified on the ground that it was an element of appellate authority.

Thus in *ex parte* Watkins (3d Peters, 202),

Ch. Justice MARSHALL said:

"It is in the nature of a writ of error to examine "the legality of the commitment," and this Court ruled when the case again came before it (7 Peters, 574) that it "has no appellate jurisdiction to revise "the sentences of inferior Courts in criminal cases; "and cannot, even if the excess of the fine were "apparent on the record, reverse the sentence."

Again in *ex parte* Milburn (9 Peters, 704),

which was an application for a writ of *habeas corpus*, Ch.-Justice Marshall again said:

"As the jurisdiction of the Supreme Court is

"appellate, it must first be shown that the Court "has the power in this case to award a *habeas* "*corpus*."

A rule was granted to show cause, but in the final opinion the writ was refused on other grounds.

Subsequently in *ex parte* Barry (2d Howard, 65),

Mr. Justice Story maintained the same view, and disclosed, according to the late Mr. Justice Clifford, what may be considered the true doctrine upon the whole subject of the power of this Court to grant writs of *habeas corpus* under existing laws.

Said he:

"No case is presented for the exercise of the "appellate jurisdiction of this Court, by any "review of the final decision and award of the "Circuit Court upon any such proceeding.

"The case then is one avowedly and nakedly for "the exercise of original jurisdiction by this Court.

"Now the Constitution of the United States has "not confided any original jurisdiction to this "Court, except in cases affecting ambassadors, "other public ministers and consuls, and those in "which a State shall be a party.

"The present case falls not within either pre-"dicament.

"It is the case of a private individual, who is an "alien, seeking redress for a supposed wrong done "him by another private individual, who is a citi-"zen of New York.

"It is plain, therefore, that this Court has no "original jurisdiction to entertain the present peti-"tion, and we cannot issue any writ of *habeas* "*corpus*, except when it is necessary for the exer-"cise of the jurisdiction, original or appellate, "given to it by the Constitution or Laws of the "United States."

In *ex-parte* Kearney (7th Wheaton, 42),

Mr. Justice Story in delivering the opinion of this Court, said:

"It is to be considered that this Court has no "appellate jurisdiction confided to it in criminal "cases by the laws of the United States.

"It cannot entertain a writ of error, to revise the "judgment of the Circuit Court, in any case where "a party has been convicted of a public offense. "And undoubtedly the denial of this authority "proceeded upon great principles of public policy "and convenience.

"If every party had a right to bring before this "Court every case, in which judgment had passed "against him, for a crime or misdemeanor or felony, "the course of justice might be materially delayed, "and in some cases, totally frustrated."

"If, then, this Court cannot *directly* revise a "judgment of the Circuit Court in a criminal case, "what reason is there to suppose it was intended "to vest it with the authority to do it indirectly?"

So far as General Courts-Martial in the Army of the United States are concerned, there is no appellate jurisdiction vested by statute in any one of the Courts of Record of the United States over their proceedings, nor will any writ of error lie from one of the last-named Courts to the former.

Appellate jurisdiction is the power to revise and correct the judgment of an inferior Court.

In Marbury *vs.* Madison (1 Cranch, 175),

Ch. Justice MARSHALL said that "it is the essen- "tial criterion of appellate jurisdiction that it re- "vises and corrects the proceedings in a cause "already instituted, and *does not create the* "*cause.*"

The case now under consideration was not instituted in any tribunal over which this Court may exercise any supervisory power.

The power of this Court under the Constitution and laws of Congress, does not and cannot reach the forum where the matter was instituted and decided.

Further, in all the cases where the power to issue the writ of *habeas corpus* by this Court has been exercised or countenanced, it has been upon the ground of revising, in some form, the doings of an inferior tribunal, over which this Court possesses appellate power.

U. S. *vs.* Hamilton, 3 Dallas, 17.
Ex parte Burford, 3d Cranch, 453.
Ex parte Bolman & Swartwout, 4 Cranch, 75.
Ex parte Kearney, 7 Wheaton, 38.
Ex parte Watkins, 3d Peters, 193.
Ex parte Watkins, 7 Peters, 568.
Holmes *vs.* Jennison, *et al.*, 14 Peters, 540.
Barry *vs.* Mercein, *et al.*, 5 Howard, 103.
Ex parte Wm. Wells, 18 Howard, 307.
Ex parte McArdle, 6 Wallace, 318; 7 Wallace, 506.

From these cases it appears that in order to bring a case within the appellate jurisdiction of this Court, in the sense requisite to enable it to award a writ of *habeas corpus* under section 751, Revised Statutes, it is necessary that the commitment should appear to have been by a tribunal whose decisions are subject to revision by this Court.

No such writ, so far as known, has ever been granted by this Court, when the petitioner at the time he petitioned for it was not in confinement under an order of a Court whose proceedings can be revised here under the appellate jurisdiction specially conferred by statute.

This principle was further illustrated in the following cases:

In *ex parte* Metzger (5 Howard, 191), which was an application for the writ by a prisoner committed to the custody of the Marshal by the U. S. District Judge for the Southern District of

New York under the treaty of extradition with France, this Court said :

"There is no forum in which an appellate power "can be exercised by this Court over the proceed- "ings of a District Judge at his chambers.

"He exercises a special authority, and the law "has made no provision for the revision of his judg- "ment.

"It cannot be brought before the Circuit or Dis- "trict Court ; consequently it cannot, in the nature "of an appeal, be brought before this Court.

"The exercise of an original jurisdiction only "could reach such a proceeding, and this has not "been given by Congress, if they have the power "to confer it."

In *ex parte* Kaine (14 Howard 103), a prisoner committed by a United States Commissioner under an extradition treaty with Great Britain, after the dismissal, upon a hearing, of a writ of *habeas corpus* issued by the Circuit Court for the Southern District of New York, an application was made to this Court for writs of *habeas corpus* and *certiorari*.

One question argued, was in the language of Mr. Justice Nelson whether "the prisoner was or was not held in confinement under the order of the Circuit Court," or whether the decision of the Circuit Court was "the cause of commitment?"

For, if it was, it was admitted that this Court had jurisdiction to inquire into it ; and if it was not, the decision of the Circuit Court was not within the exigency of the writ, formed no part of its subject matter, and was not within the appellate control of this Court.

Jurisdiction is the right to hear and determine a cause.

U. S. *vs.* Arredendo, 6 Peters, 691.
Sheldon *vs.* Newton, 3 Ohio State, 499.

In the case of Rhode Island *vs.* Mass., (12 Peters, 718),

Mr. Justice BALDWIN said:

"Jurisdiction is the power to hear and determine "the subject matter in controversy between parties "to a suit; to adjudicate or exercise any judicial "power over them."

In Holmes *vs.* Jennison, (14 Peters, 566), this Court decided "that a proceeding on *habeas corpus* is a suit, "as used in the Judiciary Act of 1789."

In *ex parte* Yerger, (8 Wallace, 101,) this Court said that "the Act of 1789 provided that every Court "of the United States should have power to issue "the writ.

"The jurisdiction thus given in law to the "Circuit and District Courts is *original*; that given by the "Constitution and law to this Court is *appellate*."

If a person should be arrested and held in custody on the charge of being a deserter from the Army of the United States, and should apply to this Court for a writ of *habeas corpus* on the plea that he was not thus amenable, its issuance would be clearly an exercise of original jurisdiction not authorized by the Constitution of the United States.

The contention of the petitioner in the present proceeding is that the action of the General Court Martial which tried him was *coram non judice* and void; in other words, that he was not thus amenable.

His proper remedy for the alleged illegal restraint would be to the appropriate Circuit or District Court of the United States, or to one of the Justices or Judges of the United States in the Northern District of New York, under Section 752, Revised Statutes.

The issuance of the writ would be an exercise of original jurisdiction which would, under Section

764 Revised Statutes, enable this Court to exercise its appellate jurisdiction, and in no other way.

This Court has appellate power only in cases provided for by Congress.

Durrousseau *vs.* United States, 6 Cranch, 307.

And that body has not provided by law for a review by this Court of the acts and proceedings of any General Court-Martial in the army of the United States, except in the indirect manner above indicated.

Every existing statutory regulation of the appellate power of this Court excludes and excepts from that jurisdiction cases adjudicated by such tribunals.

Secs. 690 to 710 Revised Statutes.

The conclusions herein arrived at, that the petitioner prays for the exercise of an original jurisdiction by this Court, are strongly favored by the context of Chapter Thirteen of the Revised Statutes, under the title of "*Habeas Corpus*," in the methods there carefully provided for appeal to this Court.

It is to be observed that whatever jurisdiction was possessed by the General Court-Martial, under the constitutional power of Congress to make rules for the Government and regulation of the land forces (*Const. Art.* I, *Sec.* 8), it was not a part of the judicial power defined in the Third Article of the Constitution, and it has been held that the appellate power of this Court cannot extend beyond the action of inferior Courts established by Congress to take original jurisdiction under the Third Article of the Constitution and which exercise the judicial power therein conferred.

Finally, if any doubt remained that the exercise of the jurisdiction prayed for is without the constitutional province of this Court to grant, the decision of this Court in *ex parte* Vallandigham,

(1 Wallace 252),

seems conclusive.

In that case the petitioner having been tried, convicted and sentenced by a military commission, applied for a writ of *certiorari*.

Mr. Justice Wayne in delivering the opinion of this Court said :

"The appellate powers of the Supreme Court, "as granted by the Constitution, are limited and "regulated by the acts of Congress, and must be "exercised subject to the exceptions and regula- "tions made by Congress.

"In other words, the petition before us we think "not to be within the letter or spirit of the grants "of appellate jurisdiction to the Supreme Court.

"It is not in law or equity within the meaning "of those terms as used in the 3d Article of the "Constitution. Nor is a military commission a "Court within the meaning of the 14th Section of "the Judiciary Act of 1789." * * * * *

"Whatever may be the force of Vallandigham's "protest that he was not triable by a Court of "military commission, it is certain that his peti- "tion cannot be brought within the 14th Section "of the Act ; and, further, that the Court cannot, "withtout disregarding its frequent decisions and "interpretations of the Constitution in respect to its "judical power, originate a writ of *certiorari* to re- "view or pronounce any opinion upon the proceed- "ings of a military commission."

On the subject of original jurisdiction, the learned Judge said :

"The rule of construction of the Constutition be- "ing, that affirmative words in the Constitution, "declaring in what cases the Supreme Court shall "have original jurisdiction must be construed "negatively as to all other cases."

In concluding that case this Court held that "there is no original jurisdiction in the Supreme "Court to issue a writ of *habeas corpus ad subji- "ciendum* to review or reverse its proceedings, or "the writ of *certiorari* to revise the proceedings of "a military commission."

The petitioner's prayer was, therefore, denied.

Second Point.—*The General Court-Martial which tried the petitioner had jurisdiction over the crime of which he was convicted and for which he is now in execution of sentence.*

The crime is stated as follows:

(*Petitioner's Exhibit No.* 1.)

"*Charge.*—Violation of the 62d Article of "War."

"*Specification.*—In this, that First Ser- "geant (now Sergeant) *John A. Mason*, Bat- "tery 'B,' 2d Artillery, having been or- "dered with his battery, from Washington "Barracks, for guard duty at the United "States Jail in the city of Washington, D. "C., and having arrived at said jail, for "said duty, did, thereupon, with intent to "kill *Charles J. Guiteau*, a prisoner then "confined under the authority of the United "States in said jail, wilfully and feloniously "discharge his musket, loaded with ball "cartridge, at said *Guiteau*, through a win- "dow of said jail into the cell then occupied "by the said *Guiteau*. This at the District "Jail, Washington, D. C., on or about Sep- "tember 11th, 1881."

"PLEA.

"To the *Specification*,	"Not Guilty."
"To the CHARGE,	"Not Guilty."

"FINDING.

"Of the *Specification*,	"Guilty."
"Of the CHARGE	"Guilty."

"SENTENCE.

"*To be dishonorably discharged the ser-*
"*vice of the United States, with the loss*
"*of all pay and allowances now due or to*
"*become due to him, and then to be confined*
"*at hard labor in such penitentiary as the*
"*proper authority may direct, for eight* (8)
"*years.*"

General Courts-Martial in the Army of the United States, as in the British service, are Courts of special and limited statutory jurisdiction.

Rex *vs.* Priv. Jno. Suddis 1 East, 306.
Dynes *vs.* Hoover, 20 Howard, 65.

There, can however, be no reasonable doubt of the competency and completeness of the jurisdiction of such tribunals in cases affecting military persons under the conditions provided in the Article of War (*Sec.* 1342, *Revised Stat.*)

Houston *vs.* Moore, 5 Wheaton, 1.
Sergeant on the Const., 130.

The petitioner admits that if the alleged crime had been committed in time of war he would have been amenable to the General Court-Martial which tried him.

The Article of War on that subject is as follows:

"ART. 58.—In time of war, insurrection,
"or rebellion, larceny, robbery, burglary,
"arson, mayhem, manslaughter, murder,
"assault and battery with an intent to kill,
"wounding, by shooting or stabbing, with an
"intent to commit murder, rape, or assault
"and battery with an intent to commit rape,
"shall be punishable by the sentence of a
"General Court-Martial, when committed
"by persons in the military service of the

"United States, and the punishment in any "such case shall not be less than the pun- "ishment provided, for the like offense, by "the laws of the State, Territory or District "in which such offense may have been com- "mitted."

This act was first passed on the 3d March, 1863, (*vol.* 12 *Stat. at Large*, *p.* 731) as Section 30 in "An "Act for enrolling and calling out the national "forces and for other purposes."

Its purpose was apparent, viz: to vest *exclusive* jurisdiction in General Courts-Martial to try the felonies mentioned, when committed by persons in the military service of the United States, and thus prevent those collusive efforts by which many volunteer soldiers had been kept from going to the front, on charges of crimes for many of which bail could be given.

The evident intent of Congress was to oust any concurrent jurisdiction in the State Courts, over these crimes when committed by soldiers.

Whether such jurisdiction could thus be taken away it is not necessary here to consider.

In the revision of the Statutes this enactment was incorporated as the 58th Article of war.

It has no applicancy in the present discussion.

It is urged by the petitioner that the crime for which he was tried was one of exclusive civil cognizance, and that the Civil Courts of criminal jurisdiction alone could take cognizance thereof. This argument is based on the 59th Article of War, which is as follows:

"ART. 59. When any officer or soldier is "accused of a capital crime, or of any offense "against the person or property of any cit- "izen of any of the United States, which is

"punishable by the laws of the land, the "commanding officer, and the officers of the "regiment troop, battery, company or de- "tachment, to which the person so accused "belongs, are required, except in time of "war, upon application duly made by or in "behalf of the party injured, to use their "utmost endeavors to deliver him over to "the civil magistrate, and to aid the officers "of justice in apprehending and securing "him, in order to bring him to trial. If, "upon such application, any officer refuses "or willfully neglects, except in time of "war, to deliver over such accused person "to the civil magistrates, or to aid the offi- "cers of justice in apprehending him, he "shall be dismissed from the service."

This article of war was adopted orignally during the revolutionary war from the British articles:

From its context it is plain:

1. That for any *capital crime* the officer or soldier accused must be delivered on demand.

2d. For any *offense* against the person or property of any citizen the same course must be pursued.

It is noticeable however that a clear distinction is made in this article between the expressions "crime" and "offense."

A crime is necessarily against the peace and dignity of the Government.

An offense against the person or property of any citizen is not necessarily so, and it is to be doubted how far Congress intend-

ed the expression "offense" to cover felonies not capital.

If it did intend to include such felonies, the language used is cumbrous and needlessly prolix. It would have been more precise to say, in order to express such a meaning that "when any officer or soldier is accused of any crime, which is punishable by the laws of the land," then, &c.

3d. If the crime is a capital one, the "People of the State" constitute the party injured to make demand.

If the offense is against the person or property of any citizen, he is primarily the party injured, by or in behalf of whom the demand for delivery is made.

4th. The application for delivery must be *duly* made.

It cannot be said with propriety that an application is *duly* made, when upwards of five months is permitted to elapse.

In this connection it is to be noticed that the petition herein contains no declaration that before the trial by General Court-Martial any application for the delivery of the petitioner to the civil authorities was ever made.

The presumption, therefore, is that no such application was made.

This Article of War was formerly known as the 33d.

The jurisdiction of the General Court-Martial over the crime charged did not, however, depend on an argumentative deduction from the context of several enactments, but on positive statute law,

found in the 62d Article of War, which is as follows:

All crimes not capital, and all disorders and neglects, which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the foregoing Articles of War, are to be taken cognizance of by a general or a regimental garrison, or field officers' Court-Martial, according to the nature and degree of the offense, and punished at the discretion of such Court.

This article was adopted by the Continental Congress on the 20th September, 1776.

Certainly the crime of which the petitioner has been convicted was a "crime not capital."

Whether the jurisdiction to try the accused for the alleged act was a concurrent one in the military and civil Courts, in which case the one first exercising jurisdiction would acquire control, to the exclusion of the other (9 *Wheaton*, 532), or whether two offenses under different laws, punishable by different tribunals, were committed by the petitioner, it would be unnecessary to discuss, the moment it appears that there was positive law for the action taken by the General Court-Martial.

There is and can be no avoidance of the plain terms of the statute.

"*All crimes not capital*, and all disorders and neglects, which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the Articles of War, *are to be taken cognizance of* by a General Court-Martial," etc.

Mere neglects of duty may arise out of a failure to comply with army regulations.

Crimes not capital, however, can only be declared by the direct legislative will.

The 66th Article of War prescribes that: "Soldiers charged with crime shall be confined until tried by Court-Martial, or released by proper authority."

There are but few crimes specified in the Articles of War, and they are of a strictly military character, like desertion, absence without leave, mutiny, etc., of which a civilian could not be guilty.

The great mass of cases brought before General Courts-Martial for trial in the past century are and have been cases arising under the 62d Article of War, and a large number of these are "crimes not capital"

The contention of the petitioner that all such cases should, if tried at all be tried by the civil magistrate, would give a fatal blow to military discipline and the efficiency of the army as an organized, disciplined collective force to be used for the purposes constitutionally specified by Congress.

Congress recognizes this fact, and that "crimes not capital" are triable by General Court-Martial, and for many years has made annual appropriations "for payment of costs and charges of State "penitentiaries for the care, clothing, maintenance "and medical attendance of United States military "convicts confined in them."

Sess. Laws, 16 June, 1880, chap. 235, p. 269.

Sess. Laws, 3 Mar., 1881, chap. 133, p. 445.

Before the present 58 "Article of War (*ante*) was adopted as to *exclusive* jurisdiction over certain felonies, *in time of war*, and under precisely the condition represented by the 62d Article of War as to jurisdiction of General Courts-Martial over "crimes not capital" Congress passed an act

(Sec. 1, July 16, 1862, chap. 190.)

"That hereafter no person in the military service

" of the United States convicted and sentenced by " a court-martial shall be punished by confinement " in the Penitentiary of the District of Columbia " *unless* the offense of which such person may " be convicted would, by some statute of the Uni- " ted States, or at common law, as the same exists " in the said District, subject such convict to said " punishment."

It was further provided by that act that all " persons who have heretofore been, or may here- " after be, convicted and sentenced by a Court Mar- " tial for any offence, which if tried before the " Criminal Court of said District, would not sub- " ject such person to imprisonment in the peniten- " tiary, and who are now, or may hereafter be, con- " fined therein," should be removed to other places of confinement, and these provisions were extended to all other penitentiaries.

This law was a clear statutory sanction of trials and convictions by General Courts-Martial for " crimes not capital" under the 62d article.

It has been engrafted into the Arficles of War, in the Statutory Revision of 1874, as the 97th as follows:

" No person in the military service shall, under " the sentence of a Court-Martial, be punished by " confinement in a penitentiary, *unless* the offense " of which he may be convicted would, by some " statute of the United States, or by some statute " of the State, Territory, or District, in which " such offense may be committed, or by the com- " mon law as the same exists in such State, Ter- " ritory, or District, subject such convictto such " punishment."

Subsidiary questions arise in considering the true intent of the 59 Article, as to delivery on application for "offenses against the person or property of any citizen" and the latter authority to Courts-Martial in the 62d Article, to try " all crimes not capital."

In Asst.-Surgeon J. M. Steiner's and Major Mar-

shall S. Howe's cases, Attorney-General Caleb Cushing, in elaborate opinions, (VI Op. Atty's Gen'l, 413, 511.) assumed that an officer or soldier could commit a felony under the common law and also be guilty at the same time of an act "to the prejudice of good order and military discipline," and be tried at Oyer and Terminer, and also by general Court-Martial.

It is plain that one of the acts may be very much less in degree, though not in kind.

Thus a soldier may strike his superior officer while passing through the streets of this city.

It would be but an ordinary criminal assault and battery when punished by the local judiciary, but a possible *capital* crime when tried before a general Court-Martial as a violation of the 21st Article of War.

In like manner the crime with which the petitioner was charged—was, although a felony at common law, nevertheless—very much less serious than when viewed as conduct to the prejudice of good order and military discipline, in violation of the 62d Article of War, for having been armed by the Government for a public purpose and ordered, as alleged, with his battery for guard duty to the United States jail, and having arrived there for said duty, did thereupon attempt to do that which presumedly he was sent there to prevent.

On the other hand a soldier absent without leave and divested of his uniform, and for the time being of his apparent military character, might commit a misdemeanor. The punishment by the Civil Tribunal would probably be severe, but that of the Military Tribunal for mere absence without leave might be slight.

There is no repugnancy to this view of two offences, or double accountability.

A person may be indicted for an assault committed in view of the Court, though previously fined for contempt.

Rex. *vs.* Lord Ossulston, 2d Strange, 1107.

State *vs.* Yancey, 1 Car. L. R., 519.
State *vs.* Standifer, 5 Porter, 523.

One act may constitute as many distinct offences as the Legislature may choose to direct, for any one of which there may be a conviction without regard to the others.

Fant *vs.* People, 45 Ill., 259.
The State *vs.* Crummey, 17 Minn., 72.
Crocker *vs.* The State, 47 Ga., 568.
Bishop on Crim. Law, 1 vol., sec. 1060.
Wilson *vs.* State, 24 Conn., 57.
Wharton on Crim. Law, 1 vol., sec. 565.
Moore *vs.* The People of Ill., XIV. Howard, U.S., 20.
Fox *vs.* The State of Ohio, V. Howard, U.S., 434.
U. S. *vs.* Marigold, IX. Howard, 569.

"Immunity from one crime cannot be obtained by "proving that, in doing the act, the party com- "mitted another."

Rawle on Const., p. 208.

As stated by Mr. Bishop
(Crim. Law, 6 Ed., sec. 1051),
offences are not the same:

"1st. When the two indictments are so diverse "as to preclude the same evidence from sustaining "both.

2d. "When the evidence offered on the first "indictment, and that intended to be offered on the "second, relate to different transactions whatever "be the words of the respective allegations.

"3d. "*When each indictment sets out an of- "fense differing in all its elements from that in "the other, though both relate to one transaction— "a proposition of which the exact limits are diffi- "cult to define.*"

It is immaterial in which way the acts charged against the petitioner and for which he was tried are viewed, whether as a common law felony or as a felonious act which, *at the same time*, was, *from all the surrounding circumstances of the case*, as charged and developed in evidence, a most grave and, so far as the American Army is concerned, a heretofore unknown instance of "conduct to the prejudice of good order and military discipline," the General Court-Martial was obliged to take cognizance of and try the case under the 62d Article of War.

In *ex-parte* Milligan

(4th Wallace, 123),

this Court said:

"The discipline necessary to the efficiency of the "Army and Navy required other and swifter modes "of trial than are furnished by the common law "Courts; and, in pursuance of the power conferred "by the Constitution, Congress has declared the "kinds of trial and the manner in which they "shall be conducted, for offenses committed while "the party is in the Military or Naval service.

"Every one connected with those branches of "the public service is amenable to the jurisdiction "which Congress has created for their govern- "ment, *and, while thus serving, surrenders his "right to be tried by the Civil Courts.*"

Third Point.—*Upon the facts stated, no proper case is presented to justify the issuance of the writs prayed for.*

In the case of Grant *vs.* Sir Chas. Gould, *et al.*
(2d Henry Blackstone, 69),

A motion was made to the Common Pleas *in banc.*, for a prohibition to prevent the execution of a sentence of a General Court-Martial against the

plaintiff, an alleged Sergeant in the 74 Regiment of Foot.

Among the grounds on which the prohibition was asked, were :

That evidence was received against him contrary to the rules of the common law ; and evidence for him, which was admissible, was rejected.

Also, that the offence of which the plaintiff was convicted, is not an offence cognizable by military law.

The prohibition was refused.

Ch. J., Lord LOUGHBOROUGH, saying :

"It would be extremely absurd to expect the "same precision in a charge before a Court-Martial "as is required to support a conviction by a Justice "of the Peace."

In the case of Mann against Owen, *et al.*, in the Court of Kings Bench

(IX. Barn. & Cress., 602),

which was an action by a former purser of the Navy, against the members of the Court which tried him for a "*crime not capital*," it was contended by plaintiff that the General Court-Martial had no jurisdiction to try him for the alleged crime as it was an indictable misdemeanor at common law.

It was decided by the Court that although the crime imputed to the plaintiff was an admitted indictable misdemeanor, yet it fell within the jurisdiction of the General Court-Martial under the Article of War, and judgment was accordingly given for the defendants.

In *Regina vs.* Sergt. John McCarthy

(XIV. Weekly Reporter, 918),

it was decided by the Irish Court of Queens Bench, *in banc*, in 1866, that the Court would not direct a writ of prohibition to a Court-Martial, merely be-

cause the facts which establish the military offence, disclose, at the same time, a greater offence (high treason), cognizable by the Civil Courts, provided a military offence is clear upon the evidence ;

That the military offence did not merge in the greater offence.

In Simmons on Courts-Martial (Ed., 1873, p. 13), it is laid down as to Courts Martial, " that their " ordinary jurisdiction is not only for the trial of " purely military offences, of which the Civil judi- " cature takes no cognizance, or for the trial of " offences to the prejudice of good order and mili- " tary discipline, which although punishable at " common law as misdemeanors or felonies, are " subject to more exemplary punishment by their " award ; but it is also, to a certain extent, concur- " rent with that of the ordinary Criminal Courts."

In Prendergrasts' Law, relating to the Army (2d Ed., p. 200), it is stated that :

" Courts-Martial being tribunals specially insti- " tuted by the Legislature for the trial of military " offences, it is an established rule of law, that " their sentences cannot be interfered with by the " Superior Courts of Westminster on the ground of " the punishment being excessive or dispropor- " tionate to the offence.

" The power of awarding punishment for military " offences is left entirely to the discretion of " Courts-Martial, and of the authorities by whom " they are ordered to assemble ; and when a discre- " tionary power is thus vested, the Superior Courts " have no power to control it."

In *ex parte*, Lieutenant John Waller Poe (5 Barn. & Adolphus, 688),

Lord DENMAN in the Court of Q. B., said :

" The principle of the non-interference of the " Superior Courts of law with the procedure of " Courts Martial is clear and obvious.

" The groundwork of the jurisdiction and the ex-

" tent of the powers of Court's-Martial are to be " found in the Mutiny Act and Articles of War, and " upon all questions arising upon these Her Maj- " esty's Judges are competent to decide; but the " Mutiny Act and Articles of War do not alone con- " stitute the military code, for they are for the " most part, silent upon all that relates to the pro- " cedure of the military tribunals to be erected un- " der them.

" Now this procedure is founded upon the usages " and customs of war. upon the regulations issued " by the sovereign, and upon old practice in the " army, as to all which points common law judges " have no opportunity, either from their law books " or from the course of their experience. to inform " themselves.

" It would, therefore, be most illogical, to say " nothing of the impediments to military discipline " which would thereby be interposed, to apply to " the procedure of Court's-Martial, those rules " which are applicable to another and different " course of practice."

Fourth Point.—*The General Court-Martial having jurisdiction, the sentence awarded was in its discretion under the Article of War.*

It was a case arising in the Land Forces, and thus excepted under the Constitution (*V. Amendment*) from a presentment or indictment by a Grand Jury of the vicinage.

In the absence of specific averments to the contary, this Court must presume the record *omnia rite acta.*

As was said by Lord Chief Justice Kenyon in *Rex* vs. *Suddis*,

(1 *East*, 313.)

"The Court is not now sitting as a Court of Error to review the regularity of these proceedings, nor to hunt after possible objections."

Fifth Point.—*The Rule to show cause in this proceeding should be discharged and the motion for writs of habeas corpus and certiorari overruled.*

ASA BIRD GARDNER,
Counsel for Respondent,
No. 110 Broadway,
New York.

FILED
APR 24 1882
JAMES H. McKEEN

Supreme Court of the United States.

In the matter

OF

The Petition of JOHN ANDERSON MASON, for writs of **habeas corpus** and **certiorari.**

OCTOBER TERM, 1881.

No. 16, Original.

SUPPLEMENTAL BRIEF

For Respondent, JOHN MCEWEN, Superintendent Albany Penitentiary,

ASA BIRD GARDNER,
Counsel for Respondent,
110 Broadway,
New York.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1882.

In the Supreme Court of the United States.

In the matter *of* The petition of JOHN ANDERSON MASON, for writs of *Habeas Corpus* and *Certiorari*.	*October Term*, 1881. *Original No.* 16.

SUPPLEMENTAL BRIEF FOR THE RESPONDENT, JOHN MCEWEN, *Superintendent of the Albany Penitentiary.*

On the return day under the rule to show cause in this proceeding, the counsel for petitioner, at the time of hearing, filed without previous service on the respondents a supplemental or amended petition, averring, among other matters, that a duly verified petition of the petitioner for a writ of *habeas corpus* made in the manner prescribed by law, was on or about the 15th day of March, 1882, presented to Mr. Justice Wylie, of the Supreme Court of the District of Columbia, then holding, as petitioner alleges on information and belief, a Circuit Court in and for said District; that said petition was, *as he has been advised by his counsel and verily believes*, in the form and manner prescribed by law in such cases, and substantially contained the allegations and statements referred to and set forth in his original petition to this court; that said Mr. Justice Wylie took the said application under advisement and on the same day rendered his decision denying said application and refusing the writ, and that soon thereafter the petitioner was removed to the Albany Penitentiary.

It is manifest from the context and subject-matter of this supplemental petition that as to any and all proceedings had before or by Mr. Justice Wylie, the petitioner, although not so alleging, only deposes upon information and belief.

No writ of *certiorari* is asked in order to bring up the record of Mr. Justice Wylie's Court.

Referring to the deposition for Respondent in rebuttal

of William E. Williams, assistant clerk of the Supreme Court of the District of Columbia, and clerk of the Criminal Court thereof, it appears that, at the date mentioned, Mr. Justice Wylie, Justice of the Supreme Court of said District, was holding the March *Special* Term of the said Supreme Court as a Criminal Court in and for said District (Section 759 U. S. Rev'd. Stat. Dist. of Columbia); that the application to him made on behalf of the Petitioner herein for a writ of *habeas corpus* was a *verbal* and *informal* application, and that Mr. Justice Wylie having intimated that he did not favorably consider the application in the form and manner preferred, it *was formally withdrawn*, and consequently, under the instructions of the said Justice, no record was made thereof.

The question now arises, does the filing of the supplemental petition herein, change the *status* of this proceeding as to the appellate jurisdiction of this Honorable Court?

SUPPLEMENTAL POINTS FOR RESPONDENT.

FIRST POINT:

The supplemental petition does not recite any material fact not conclusively controverted.

To obtain the writ in term time at common law, the application had to be grounded on an affidavit of the circumstances, which should show some probable cause for the application to induce the Court to grant the writ.

Hands Pr., 73.
2d Modern Rep., 306.
1 Chitty Cr. Law, 124.

To obtain the writ in vacation the request had to be in writing accompanied by an affidavit.

Hurd on *Hab. Corp.*, 214.

In the Courts of the United States the practice prevailing at common law, and at the time of the adoption of the Constitution, is still pursued, no law of Congress having been made to alter it.

Ex parte Bollman & Swartwout, 4 Cranch, U. S., 75.

The positive averment of the clerk of the Special Term of the Supreme Court of the District of Columbia held as a Criminal Court, is that the alleged application for a *habeas corpus* was *verbal* and *informal* and *formally withdrawn and no record consequently made.*

The petitioner is therefore concluded by his own action.

His application is as if it had never been made.

He can found no claims upon it, and there is nothing left to be reviewed in an appellate way in any proceeding before any Tribunal.

SECOND POINT:

The supplemental petition has no relevancy to the proceeding before this court.

Assuming for argument that the averments of petitioner on information and belief in his supplemental petition had not been controverted and positively denied by the clerk of the Special Term, it is plain that if any injustice was done him by any alleged order or decree of Mr. Justice Wylie, he has mistaken his remedy and forum.

The Revised Statutes for the District of Columbia provide for the case in discussion on a proper state of facts.

Sec. 754 institutes General Terms of the Supreme Court of the District and provides that any one of the justices may hold a special term.

Sec. 759 provides that "the *special* term held as the "criminal court shall be holden on the first Monday in "March. * * * * * *"

Sec. 772. "Any party aggrieved by any order, judg- "ment, or decree made or pronounced at any special "term, may, if the same involves the merits of the ac- "tion or proceeding, appeal therefrom to the General "Term of the Supreme Court, and upon such appeal the "General Term shall review such order, judgment, or "decree, and affirm, reverse, or modify the same as shall "be just."

A remedy is given by these provisions ample and complete in any proceeding on *habeas corpus*, and may be considered exclusive.

If the declination of Mr. Justice Wylie to entertain the alleged application deprived the petitioner of any substantial right, his remedy, if any, is an appeal to the General Term of the Supreme Court of the District of Columbia, provided the case is in such a condition that such an appeal can be perfected.

In the matter of *ex parte* Pool,

(2d MacArthur, 591,)

the General Term of that Court held, in 1876, "that the "writ of *habeas corpus* is a common law writ, and, if it "can be issued at all in this District, it may be issued "and proceeded with by any one of the five justices com- "posing the Court; and if the Justice who ordered the "writ happens for the time being to be holding the Court "for hearing of cases in equity, he has the same power, "and no more, than the Judge holding the Criminal or "Circuit Court, or the Judge who is holding no Court "at all; for this writ may be issued by any Justice of "this Court at Chambers."

In the matter of George Taylor,

(3d MacArthur, 426,)

the General Term of the Supreme Court of this District ruled, in 1877, that "from the *final* decision of one of "the Justices of that Court at Chambers, upon the "*hearing and determination* of a *habeas corpus*, an appeal "may be taken to the General Term."

In this case there was an actual production of the body and a hearing and jurisdiction acquired, and the General Term decided that the Justice at Chambers was "inferior" to the Court at General Term within the applicancy and intendment of such an expression as used in Sec. 763, U. S. Revised Statutes.

It is to be observed that in the present case the alleged declination or refusal of Mr. Justice Wylie was in the exercise of an undoubted judicial discretion.

He did not actually take jurisdiction under the process of *habeas corpus*, and no judicial power was exercised over the petitioner in the premises.

It left him at liberty to apply in the requisite manner to any competent court or justice, and he may still make such application to the United States Circuit or District

Court for the Northern District of New York, or to any Judge thereof.

The petitioner is not therefore held in custody under any order of a Justice of the Supreme Court of the District of Columbia.

Without the production of the body, said the Supreme Judicial Court of Massachusetts, the writ is without effect; the case has no status.

(Commonwealth *vs.* Chandler, 11 Mass. Rep., 83.)

The application of the Petitioner to this Honorable Court for a writ of *habeas corpus* is either for this Court to take an original Jurisdiction which may be exercised only by the U. S. Courts or Justices in the Northern District of New York, or to exercise an appellate jurisdiction which belongs, if anywhere, in the General Term of the Supreme Court of the District of Columbia.

He has mistaken his remedy, if any he has.

THIRD POINT:

This Honorable Court is given no jurisdiction by any subsisting averment of the supplemental petition.

It is to be observed preliminarily that a general court-martial, acting upon a person in the military service, is not an "inferior" court within the meaning of the third article of the Constitution, to whose proceedings a writ of error will lie from this Court in due course.

Its action can only be questioned incidentally and collaterally by a *final* judgment in an "inferior" court or Justice thereof to bring the case within the purview of appellate power.

In no instance has this Honorable Court undertaken heretofore to award the writ unless the petitioner was in confinement under a commitment from some court of record of the United States, where the question of *jurisdiction as a question of law* might have eventually been brought up by writ of error.

This seems to be the principle announced in *ex parte* Yerger, (8 *Wallace*, 85;) *ex parte* Lange, (18 *Wallace*, 163;) *ex parte* Virginia, (100 *U. S.*, 342, 343;) *ex parte* Siebold, (100 *U. S.*, 374.)

In *ex parte* Parks (93 U. S. 22,) this Court said:

"That except in aid of some other acknowledged "jurisdiction it can only issue the writ to review the

"action of some inferior Court or officer;" and (p. 21) that "it is a special mode, and confined to a limited "class of cases."

These opinions are all in harmony with that of *ex parte* Vallandigham (1 Wallace, 252).

By section 846 of the Revised Statutes for the District of Columbia any *final* judgment, order, or decree of the Supreme Court of the District may be re-examined and reversed or affirmed in this court upon writ of error or appeal in the same manner as provided by law in reference to the final judgments, orders, and decrees of the Circuit Courts of the United States.

Taking the supplemental petition and rebutting evidence together, no final judgment, order, or decree, even at special term, is discoverable.

Presumably had there been one and Congress had intended that this Court should have power to pass the General Term and go down directly to such Special Term, the authority would have been given.

Such authority exists as to the final judgment at law of the Circuit Courts of the United States in any case brought on account of the deprivation of any right, privilege, or immunity secured by the Constitution, or of any right or privilege of a citizen of the United States. (Rev'd Stat., secs. 699, 716, 751, 764.)

Section 1909 allows a writ of error or appeal from the decision of the Supreme Court of any of the Western Territories, or of any judge thereof, or of the District Courts therein, or of any judge thereof "upon writs of *habeas corpus* involving the question of personal freedom."

Congress has not made such provision as to the *final* order, decree, or judgment of a Special Term of the Supreme Court of the District of Columbia on *habeas corpus* or of any judge thereof, but has carefully and specially provided for an appeal to its General Term.

In the present state of the case, even on the petitioner's own showing, this Court cannot acquire jurisdiction.

FOURTH POINT:

The supplemental petition should be denied.

ASA BIRD GARDNER,
Counsel for Respondent.

FILED
SUPREME COURT U.S.

Supreme Court of the United States.

In the matter

of

The Petition of JOHN ANDERSON MASON, for writs of **habeas corpus** and **certiorari.**

OCTOBER TERM, 1881.

No. 16, Original.

AFFIDAVITS IN REBUTTAL

For Respondent, JOHN MCEWEN, Superintendent Albany Penitentiary.

ASA BIRD GARDNER,

Counsel for Respondent,

110 Broadway,

New York.

LYTH & CO., PRINTERS, 120 BROADWAY, N. Y.

Supreme Court

OF THE UNITIED STATES.

In the Matter *of* The Petition of JOHN ANDERSON MASON, for a writ of *Habeas Corpus* and *Certiorari*.	*October Term. No.* 16, *Original.*

DISTRICT OF COLUMBIA, *City of Washington.* } ss.:

ROMEYN B. AYRES, being duly sworn, according to law, deposes and says: That during the times mentioned herein, and at the present time, he was, and is, Colonel of the Second Regiment, United States Artillery, and Brevet Major-General, United States Army, and Commandant of the Military Post of Washington Barracks (late Arsenal) in this District, garrisoned only by artillery troops.

That on and prior to the 11th day of September, 1881, John Anderson Mason, the petitioner herein, was an enlisted soldier under pay, and regularly mustered in the army of the United States, and voluntarily serving under a warrant of appointment, as "First Sergeant of Battery 'B,'" in deponent's said regiment.

That on the 14th day of July, 1881, deponent received from the President of the United States, an order of which a full copy with subsequent

communication thereon, are hereto annexed, marked "A."

That, in accordance with said order, a guard, consisting of one foot battery, armed as infantry, from that portion of deponent's regiment, stationed at Washington Barracks, was placed at said United States jail, and regularly succeeded at the end of twenty-four hours by another foot battery of his regiment, sent by him from the same post, and that the foot batteries of his regiment at said post in succession took said duty, and that said Mason on several occasions performed said duty with his battery.

That on the afternoon of the 11th day of September, 1881, Battery "B," of the Second Regiment of Artillery, to which the petitioner, Mason, belonged, and with which he was then on duty as First Sergeant, was duly paraded under arms and inspected at Washington Barracks, for the purpose of proceeding to the United States jail in this District, to perform the duty required in said order of the Presidont ("A"), and thereupon proceeded in the performance of said duty.

That subsequently, on the same day (11th September, 1881), First Sergeant Mason, the petitioner herein, was brought back to this deponent's post, charged with a crime to the prejudice of good order and military discipline, narrated in Exhibit No. 1, attached to the petitioner's petition herein.

That said Mason was thereupon confined as prescribed by the 66th Article of War (Revised Statutes), and Major-General Winfield S. Hancock, of the United States Army, commanding the Military Geographical Department of the East, was duly notified, and charges in usual course of military procedure were preferred against the said Mason for said crime in violation of the 62d Article of War.

That on the 20th day of September, 1881, deponent received a letter of instructions from the said

Major-General Hancock, a copy of which is hereto annexed, marked "B."

That, in accordance with said instructions, this deponent, on the same day, had an interview with George B. Corkhill, Esq., Attorney for the United States for the District of Columbia, and communicated to him said instructions, and was informed by said U. S. Attorney that nothing would be done before the Grand Jury should meet on October 3d, 1881; but as to what, if anything, might be done then, he, the said U. S. Attorney, could not predict.

Deponent says that he is informed and believes that no action whatever was or has been taken in this case by the civil authorities of the District of Columbia.

That said petitioner, Mason, was held in custody at Washington Barracks, in deponent's immediate command, from the 11th September, 1881, until sent to the Albany Penitentiary, by order of the Honorable Secretary of War (copy enclosed, marked "C"), on March 15th, 1882, in execution of sentence, but that during this time no application has ever been or was made by or in behalf of any party alleged to be injured by the petitioner herein, or by any civil magistrate or officer of justice, for the delivery of the said petitioner in order to bring him to trial for any offence alleged to have been committed on or about the 11th day of September, 1881, against the person or property of any citizen, or in any way relating to or concerning the crime described in the General Court Martial Order No. 26 (Petitioner's, Exhibit No. 1).

R. B. AYRES.

Subscribed and sworn to before me, this 13th day of April, 1882.

SAM'L H. WALKER,
Notary Public.

"A."

ADJUTANT-GENERAL'S OFFICE,
WASHINGTON, July 4, 1881.

COMMANDING OFFICER,
WASHINGTON BARRACKS, D. C.

The Secretary of War directs that one (1) company of your command be constantly on guard at the jail until further orders, and that the balance of the companies at the post be held in readiness for immediate service. Acknowledge receipt.

R. C. DRUM,
Adjutant-General.

HEADQUARTERS OF THE ARMY
Adjutant-General's Office.

WASHINGTON, July 8, 1881.

Colonel R. B. AYRES,
2d Artillery,
Commanding Washington Barracks,
D. C.

Sir.—I have the honor to inform you that your request of the 7th instant for the relief of the troops of your command now on duty as a guard at the District Jail, has been submitted by the General of the Army to the Secretary of War, who thinks that, as the guard will be required for so short a time, it will be better not to make any change now.

Very respectfully,

Your obedient Servant,

R. C. DRUM,
Adjutant-General.

"B."

HEADQUARTERS, DEPARTMENT OF THE EAST,
Governor's Island, New York.
SEPTFMBER 19, 1881.

To
Colonel R. B. AYRES,
2d Artillery,
Commanding Washington Barracks,
D. C.

Sir.—The Major-General commanding directs me to say as follows:

In the case of First Sergeant J. A. Mason, Battery "B," 2d Artillery, against whom charge and specification has been preferred for trial by General Court-Martial, for an alleged attempt to kill a prisoner (C. J. Guiteau) in the Washington Jail, the Department Commander desires to know if any requisition has been made by the civil authorities for his rendition for trial by the Oyer and Terminer for attempt to kill.

Such a requisition should be complied with.

You will please call upon the United States Attorney of the District of Columbia and ascertain whether he proposes to bring the case before the Grand Jury with a view to Mason's trial by the civil authorities, in which case he will not be tried by General Court-Martial, but held to await such action.

If, however, the United States Attorney does not propose to take this action, Sergeant Mason will be tried by General Court-Martial, under the 62d Article of War, for the crime of "Attempt to Kill," as "prejudicial to good order and military discipline," in consequence of his status as a soldier and the circumstances of the case.

Please telegraph your reply to this communication.

Very respectfully,

Your obedient servant,

W. G. MITCHELL,
Asst. Adjutant-General.

"C."

HEADQUARTERS OF THE ARMY,
Adjutant General's Office,

WASHINGTON, March 11, 1882.

Special Orders,
No. 57.

* * * * * *

6. By direction of the Secretary of War, the Albany Pennitentiary, New York, is designated as the place for the execution of so much of the sentence of a General Court-Martial (General Court-Martial Orders, No. 26, March 10, 1882, Department of the East), in the case of John A. Mason, late Sergeant Battery "B," 2d Artillery, as relates to confinement at hard labor.

* * * * * *

By command of General SHERMAN:

R. C. DRUM,
Adjutant General.

SUPREME COURT

OF THE UNITED STATES.

In re the Petition *of* JOHN ANDERSON MASON for a writ of *Habeas Corpus* and *Certiorari*.	*October Term*, 1881. *Original No.* 16.

STATE OF NEW YORK, *City and County of New York*, } ss.:

WILLIAM D. WHIPPLE, being duly sworn according to law, deposes and says, that he is an assistant Adjutant-General and Brevet Major-General in the Army of the United States, and during the times herein mentioned has been on duty as Assistant Adjutant-General of the "Department of the East," which has for several years comprised within its geographical limits the District of Columbia, and during several years has been, and now is, commanded under the assignment of the President of the United States, by Major-General Winfield S. Hancock of the United States Army, with headquarters at Governor's Island, New York city.

Deponent further says that it appears from the records of his office, and he is informed and believes, that on the 17th day of September, 1881, the communication hereto annexed, marked "A," was received at said headquarters from Mr. J. G. Bigelow, the counsel for John A. Mason, the petitioner herein, who subsequently as said counsel defended the said Mason on his trial by General Court-Martial on the 20th February, 1882, and that the "grave and serious charges" mentioned in said communication "A" are described as Exhibit No. 1 in the petition filed in this proceeding.

That on the 12th February, 1882, a communication was received by the said department commander from the Secretary of War, dated February 11, 1882, a copy of which is hereto annexed, marked "B," returning the said charge and specification (Petitioner's Exhibit No. 1) which had previously been forwarded to said Secretary.

That accordingly—no application having been, as this deponent is informed and believes, made for the delivery of the said Mason for any offense against the person or property of any citizen—a General Court-Martial, appointed by the said Major General Hancock, was, on the 13th February, 1882, ordered (copy hereto annexed, marked "C,") to convene at Washington Barracks on the 20th day of February, 1882, to try said Mason on the said charge and specification, said Court, as requested by the said petitioner's counsel, Bigelow, having been composed of officers not stationed at Washington Barracks.

That subsequently the whole proceedings of the trial and findings and sentence of said General Court-Martial on said charge and specification were duly approved and authenticated by the said department commander before the promulgation of the findings and sentence described in petitioner's said Exhibit No. 1.

WM. D. WHIPPLE.

Subscribed and sworn to before me, this 15th day of April, 1882.

[L. S. JOHN S. POWER,
Notary Public,
New York.

"A."

J. G. BIGELOW,
Attorney at Law,
323 4½ Street.

WASHINGTON, D. C., September 16th, 1881.

General.—As counsel for Sergeant John A. Mason Battery "B" 2d U. S. Artillery, against whom grave and serious charges have been recently preferred and forwarded for your action I respectfully suggest that the detail for the Court Martial—in case one be convened to try him—shall be from among officers not stationed at the Washington, D. C. Barracks

The propriety of this suggestion will occur to you without remark.

I am very respectfully your obedient servant,

J. G. BIGELOW,
Attorney for Sergeant Mason.

MAJOR GENERAL W. S. HANCOCK,
Commanding Mil. Div., of the Atlantic,
Governor's Island, New York Harbor,
N. Y.

"B."

WAR DEPARTMENT,
Adjutant-General's Office.

WASHINGTON, February 11th, 1882.

Major-General W. S. HANCOCK,
Commanding D'p't of the East,
Governor's Island, N. Y.

Sir.—I have the honor to return herewith the charges against 1st Sergeant John A. Mason, Battery "B," 2d Artillery, forwarded to this office under cover of your letter of October 8th, 1881.

The Secretary of War instructs me to say that Sergeant Mason can now, with propriety, be brought to trial on these charges.

I am, sir,
Very respectfully,
Your obedient servant,

R. C. DRUM,
Adjutant-General.

"C."

HEADQUARTERS DEPARTMENT OF THE EAST,

GOVERNOR'S ISLAND, N. Y. H.,
February 13, 1882.

SPECIAL ORDERS
No. 24.

* * *

3. The General Court Martial instituted by paragraph 2, special orders No. 168, series of 1881, from these headquarters, for the trial of 1st Sergeant *John A. Mason*, Battery "B," 2d Artillery, will meet at Washington Barracks, D. C., on Monday, the 20th day of February, 1882, at 11 o'clock A. M., or as soon thereafter as practicable, and proceed with the trial of the aforesaid Sergeant *Mason.*

The organization of the Court is now as follows:

1. *Lieutenant-Colonel Henry R. Mizner*, 10th Infantry.
2. *Major L. L. Langdon*, 2d Artillery.
3. *Captain R. H. Hall*, 10th Infantry.
4. *Captain C. B. Throckmorton*, 4th Artillery.
5. *Captain J. B. Rawles*, 5th Artillery.
6. *Captain J. N. Craig*, 10th Infantry.
7. *Captain G. V. Weir*, 5th Artillery.
8. *Captain John W. Roder*, 4th Artillery.
9. *1st Lieutenant H. J. Reilly*, 5th Artillery.
10. *2d Lieutenaut H. A. Springett*, 4th Artillery.
11. *2d Lieutenant Williston Fish*, 4th Artillery.
    2d Lieutenant E. T. Brown, 5th Artillery, Judge Advocate.

A greater number of officers than those named cannot be assembled without manifest injury to the service.

By command of

MAJOR-GENERAL HANCOCK.

WILLIAM D. WHIPPLE,
Assistant Adjutant-General.

SUPREME COURT OF THE UNITED STATES.

In re the Petition *of* JOHN ANDERSON MASON for a Writ of *Habeas Corpus* and *Certiorari*.	*October Term*, 1881. *Original No.* 16.

STATE OF NEW YORK,
City and County of New York. } ss.:

EDWARD T. BROWN, being duly sworn according

to law, says that he is a Second Lieutenant in the Fifth Regiment, United States Artillery, and was Judge Advocate of the General Court Marshal which proceeded, on the 20th day of February last, to try John A. Mason, the petitioner herein, for violation of the 62d Article of War.

Deponent says he has read the petition of said Mason, verified on the 21st March, 1882, and filed in this proceeding, and that said petition, in so far as it alleges, on advice, that said Court "was illegal in its organization as well as in its procedure," if intended thereby to state a fact, is untrue.

Deponent says, that said Court and the Judge Advocate were, after the prisoner's privilege of challenge had been exhausted, duly sworn according to the statute in the presence of the prisoner, and organized, and that each witness was duly sworn in open Court, and every requirement or limitation of the Statute or of Army Regulations as to the method of conducting the proceedings of said trial, or of keeping and authenticating the record thereof, or as to the times of session of said Court, was in all particulars complied with, and that said Mason was defended throughout by Mr. J. G. Bigelow, his counsel, with full privilege of cross-examination of all the witnesses for the prosecution, and that all witnesses requested by the defense were duly summoned and examined.

EDWARD T. BROWN.

Subscribed and sworn to before me this 15th day of April, 1882.

JOHN S. POWER,

[L.S.] *Notary Public,*

N. Y.

UNITED STATES SUPREME COURT.

In re the Petition

of

JOHN ANDERSON MASON, for a writ of *habeas corpus* and *certiorari.*

DISTRICT OF COLUMBIA, *City of Washington.* } ss. :

GEORGE B. CORKHILL, being duly sworn according to law, deposes and says, that he is the Attorney of the United States for the District of Columbia, and has held said office for more than a year last passed.

That on or about the 20th day of September, 1881, he was informed by Brevet Major-General Romeyn B. Ayres, commanding Washington Barracks, that First Sergeant John A. Mason, of Battery B, 2d Artillery, the petitioner herein, was in custody at said barracks, charged with having attempted to shoot Charles J. Guiteau, a prisoner confined in the United States Jail, in this city, on or about the 11th day of September, 1881, while he, the said Mason, was at said jail for guard duty under the orders of his military superiors, and that if the civil authorities desired to proceed against the said Mason, he would be delivered over on application.

Deponent says that since then the Grand Jury for this District has been in session, but that no indictment has been presented to or found by the Grand Jury against the said Mason, nor, as this deponent is informed and believes, has any application been made to the military authorites for the delivery of the said Mason for any alleged offence against the person or property of any citizen, but that the said Mason was left to be proceeded against

in due course by the military authorities of the United States, for the serious violation of the 62d Article of War, to the prejudice of good order and military discipline, as found in the state of facts made known to this deponent.

GEORGE B. CORKHILL.

Subscribed and sworn to before me this 14th day of April, 1882.

R. J. MEIGS,
Clerk.

By W. E. WILLIAMS,
Asst. Clerk.

Seal
Supreme Court,
Dist. of Columbia.

OFFICE SUPREME COURT U.S.
FILED
APR 24 1882
JAMES H. McKENNEY, CLK

Supreme Court of the United States.

In the matter

OF

The Petition of JOHN ANDERSON MASON, for writs of **habeas corpus** and **certiorari.**

OCTOBER TERM, 1881.

No. 16, Original.

AFFIDAVITS IN REBUTTAL

(SUPPLEMENTAL)

For Respondent, JOHN McEWEN, Superintendent Albany Penitentiary,

ASA BIRD GARDNER,
Counsel for Respondent,
110 Broadway,
New York.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1882.

In the Supreme Court of the United States.

In the matter of The petition of JOHN ANDERSON MASON, for writs of *Habeas Corpus* and *Certiorari*.	*October Term*, 1881. *Original No.* 16.

DISTRICT OF COLUMBIA, *City of Washington.* } ss:

WILLIAM E. WILLIAMS, being duly sworn according to law, deposes and says that he is Assistant Clerk of the Supreme Court of the District of Columbia, and assigned to duty as Clerk of the Criminal Court in and for said District, and has held such office and performed said assigned duties during the times herein mentioned.

That on the 15th day of March, 1882, Mr. J. G. Bigelow, Counsel for John A. Mason, the above-named petitioner, made a verbal and informal application to Mr. Justice Wylie, of the Supreme Court of the District of Columbia, then holding a Special Term of the said Criminal Court of the District, for a writ of *habeas corpus* on behalf of the said petitioner.

That Mr. Justice Wylie having intimated that he did not favorably consider the said application in the form and manner preferred, it was formally withdrawn, and consequently, under the instructions of Mr. Justice Wylie, no record was made thereof.

Deponent says he knows of no other application at said time or to any justice of said court.

W. E. WILLIAMS.

Subscribed and sworn to before me this 18th day of April, 1882.

R. J. MEIGS,
Clerk, &c.
By R. J. MEIGS No. 3,
Asst. Clerk.

Seal
Supreme Court
Dist. of Columbia.

DISTRICT OF COLUMBIA, } ss.
City of Washington. }

JONATHAN G. BIGELOW, being duly sworn according to law, deposes and says that he was the Counsel for the petitioner herein on the 15th day of March last, in the matter referred to in the foregoing affidavit.

That no petition for a writ of *habeas corpus* was in point of fact filed in the petitioner's behalf in the Supreme Court of said District, and no formal action taken in the premises by Mr, Justice Wylie or any other Justice of said Court.

That an informal application was made to Mr. Justice Wylie which was withdrawn with the view to make a formal application to the said Court at General Term on the following morning, viz: the 16th day of March, 1882.

J. G. BIGELOW.

Subscribed and sworn to before me this 20th day of April, 1882.

R. J. MEIGS,
Clerk, &c.

By R. J. MEIGS No. 3,
Asst. Clerk.

Seal
Supreme Court
Dist. of Columbia.

15 Otto 701

No. 1218

Supreme Court of the United States.

CHARLES STUART WURTS AND ROBERT LENOX KENNEDY, Plaintiffs in Error,
vs.
AMOS HOAGLAND, JAMES BOYD, AND WILLIAM L. JOHNSON, Commissioners, &c., Defendants in Error.

And now come the above plaintiffs in error, by J. G. Shipman, their counsel, and respectfully apply to this court for a supersedeas to stay the sale of their property mentioned in the record in this cause, and that a rule be issued against the defendants in error to show cause why they should not be attached for contempt for proceeding to advertise the said property for sale after a writ of error had issued and bond had been given and filed according to the rules and decisions of this court; and the plaintiffs in error refer to the affidavit annexed to this petition in support of the said order.

J. G. SHIPMAN,
Of Counsel for Plaintiffs in Error.

SUPREME COURT OF THE UNITED STATES.

CHARLES STUART WURTS AND ROBERT LENOX KENNEDY
vs.
AMOS HOAGLAND, JAMES BOYD, AND WILLIAM L. JOHNSON, Commissioners, &c., Defendants in Error.

On writ of error to Supreme Court of New Jersey.

Returnable 2d Monday in October, 1882.

J. G. Shipman, of full age, on his oath saith, that he is one of the attorneys of the plaintiffs in error in the above cause; that the judgment of affirmance by the Court of Errors and Appeals, being the highest court in the state, of the judgment of the Supreme Court of the State of New Jersey was remitted from that court and entered in the supreme court of said state on the thirty-first day of August, in the year of our Lord one thousand eight hundred and eighty-one; that on the twenty-seventh day of October of the same year a writ of error was allowed by the Honorable Joseph P. Bradley, one of the Justices of the Supreme Court of the United States, directed to the Supreme Court of New Jersey, to bring up the record and proceedings to this court, which said writ is returnable in this court on the second Monday in October next; and deponent further saith, that at the same time and place the said justice approved of a bond given to the defendants in error, conditioned to pay all costs and damages which might accrue to the defendants in error in consequence of the said writ of error, if they should fail to make their plea good. And this deponent further saith, that the original writ of error so allowed by the said Justice Bradley, and the said bond,

were lodged by this deponent personally with Benj. F. Lee, clerk of the Supreme Court of the State of New Jersey, at his office in the city of Trenton, in the State of New Jersey, on the twenty-eighth day of October, A. D. 1881, and that citations were on the same twenty-seventh day of October, A. D. 1881, allowed by Justice Bradley and were served on all the defendants in error on the twenty-sixth day of November, A. D. 1881, as appears by the affidavit of W. K. Bowers endorsed on the said citation.

And deponent further saith, that there is no personal liability against the plaintiffs in error in this proceeding, except for the costs which may be incurred; that the land embraced in the said assessment is to be sold for the least number years that any person will take the same, pay the assessment thereon, and the interest thereon, and the costs and expenses of sale. And deponent further saith, that notwithstanding the foregoing proceedings, that on or about the twenty-fourth day of February last past, the said Amos Hoagland, James Boyd, and William L. Johnson, the said commissioners, advertised the said lands embraced in the said assessment for sale on the twenty-sixth day of April, A. D. eighteen hundred and eighty-two, at the Clarendon House, in the town of Hackettstown, in the county of Warren and State of New Jersey. And deponent further saith, that after he had ascertained that the said commissioners had advertised the said lands for sale he addressed a letter to Mr. Theodore Little, one of the attorneys of the said commissioners, and inquired of him in substance whether they proposed to go on with the sale and compel deponent on behalf of his clients to get an absolute order on the commissioners to stay the said sale; that on or about the twenty-first day of March, A. D.

eighteen hundred and eighty-two, deponent received a letter from Mr. S. H. Little, the son of the said Theodore Little, and who has also been acting as one of the counsel of the said commissioners, informing deponent that his father, Theodore Little, had gone South to remain for several weeks, and that in regard to the stay that deponent must take such action as deponent deemed wise; and deponent saith that the said writ of error is brought in good faith to test the constitutionality of the law under which the said assessment is made. And deponent further saith, that he has caused to be docketed in this court the record from the Supreme Court of New Jersey, and has caused his appearance as counsel for the plaintiffs in error to be entered by himself as counsel for plaintiffs in error.

J. G. SHIPMAN.

Sworn and subscribed before me, at Washington City, in the District of Columbia, this day of April, 1882.

15 Otto 701

OFFICE SUPREME COURT U.S.
FILED
APR 6 1882
JAMES H. MCK...

No. 1217

Supreme Court of the United States.

THE CRANE IRON COMPANY, Plaintiff in Error,
vs.
AMOS HOAGLAND, JAMES BOYD, AND WILLIAM L. JOHNSON, Commissioners, &c., Defendants in Error.

And now comes the above plaintiff in error by J. G. Shipman, its counsel, and respectfully applies to this court for a supersedeas to stay the sale of its property mentioned in the record in this cause, and that a rule be issued against the defendants in error to show cause why they should not be attached for contempt in proceeding to advertise said property for sale after a writ of error had issued and a bond had been given and allowed, and filed according to the rules and decisions of this court. And the plaintiff in error refer to the affidavit annexed to this petition in support of the said order.

J. G. SHIPMAN,
Of Counsel for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

THE CRANE IRON COMPANY, Plaintiff in Error, *vs.* AMOS HOAGLAND, JAMES BOYD, AND WILLIAM L. JOHNSON, Commissioners, &c., Defendants in Error.	On writ of error to Supreme Court of New Jersey.

Returnable 2d Monday in October, A. D. 1882.

UNITED STATES OF AMERICA.

J. G. Shipman, of full age, on his oath saith, that he is one of the attorneys of the plaintiff in error in the above cause; that the judgment of affirmance by the Court of Errors and Appeals, being the highest courts of the state, of the judgment of the Supreme Court of the State of New Jersey was remitted from that court and entered in the supreme court of said state on the thirty-first day of August, in the year of our Lord one thousand eight hundred and eighty-one; that on the twenty-seventh day of October of the same year a writ of error was allowed by the Honorable Joseph P. Bradley, one of the Justices of the Supreme Court of the United States, directed to the Supreme Court of New Jersey, to bring up the record and proceedings to this court, which said writ is returnable in this court on the second Monday in October next; and deponent further saith, that at the same time and place the said justice approved of a bond given to the defendants in error, conditioned to pay all costs and damages which might accrue to the defendants in error in consequence of the said writ of error, if they should fail to make their plea good. And this deponent further saith, that the original

writ of error so allowed by the said Justice Bradley, and the said bond, were lodged by this deponent personally with Benjamin F. Lee, the clerk of the Supreme Court of the State of New Jersey, at his office in the city of Trenton, in the State of New Jersey, on the twenty-eighth day of October, A. D. eighteen hundred and eighty-one, and that citations were, on the twenty-seventh day of October, A. D. 1881, allowed by Justice Bradley, and were served on all the defendants in error on the twenty-sixth day of November, A. D. eighteen hundred and eighty-one, as appears by the affidavit of W. K. Bowers. And deponent further saith, that there is no personal liability against the plaintiff in error in this proceeding, except for the costs which may be recovered; that the land embraced in the said assessment is to be sold for the least number of years that any person will take the same and pay the assessment thereon, and the interest thereon, and the costs and expenses of sale. And deponent further saith, that notwithstanding the foregoing proceedings, that on or about the twenty-fourth day of February last past the said Amos Hoagland, James Boyd, and William L. Johnson, the said commissioners, advertised the said lands embraced in the said assessment for sale, on the twenty-sixth day of April, A. D. eighteen hundred and eighty-two, at the Clarendon House in the town of Hackettstown, in the county of Warren and State of New Jersey; and deponent further saith, that after he had ascertained that the said commissioners had advertised the said lands for sale he addressed a letter to Mr. Theodore Little, one of the attorneys of the said commissioners, and inquired of him, in substance, whether they proposed to go on with the sale, and compel deponent, on behalf of his clients, to get an absolute order on the com-

missioners to stay the said sale; that on or about the twenty-first day of March, A. D. eighteen hundred and eighty-two, deponent received a letter from Mr. S. H. Little, the son of said Theo. Little, and who has also been acting as one of the counsel of the said commissioners, informing deponent that his father, Theodore Little, had gone South to remain for some weeks, and that in regard to the stay that deponent must take such action as deponent deemed wise; and deponent saith that the said writ of error is brought in good faith, and to test the constitutionality of the law under which the said assessment is made. And deponent further saith, that he has caused to be docketed in this court the record from the Supreme Court of New Jersey, and has caused his appearance as counsel for the plaintiff in error to be entered.

J. G. SHIPMAN.

Sworn and subscribed before me, at Washington City, in the District of Columbia, this day of April, 1882.